

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petitions of the Verizon Telephone Companies)	WC Docket No. 06-172
For Forbearance Pursuant to 47 U.S.C. § 160(c))	
In the Boston, New York, Philadelphia,)	
Pittsburgh, Providence, and Virginia Beach)	
Metropolitan Statistical Areas)	
)	
In the Matter of)	
)	
Petitions of Qwest Corporation for Forbearance)	WC Docket No. 07-97
Pursuant to 47 U.S.C. §160(c) in the Denver,)	
Minneapolis-St. Paul, Phoenix and Seattle)	
Metropolitan Statistical Areas)	

COMMENTS OF COMPTTEL

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TABLE OF CONTENTS

	<u>Page</u>
Summary	iii
I. The Commission Should Acknowledge That It Made A Mistake In Omaha	4
A. The Aftermath of Forbearance in Omaha	5
II. Promotion of Competition Is Critical To The Success Of	11
The National Broadband Plan	
III. Potential Competition Should Not Be A Factor In The Commission's	14
Forbearance Analysis	
IV. Actual ILEC Market Share and Actual Facilities-Based Competition	16
Should Be The Touchstones Of The Commission's UNE	
Forbearance Analysis	
A. The ILEC Market Share Calculation Must Include All Lines	17
Provisioned Over The ILEC's Network and Facilities	
B. The Commission Must Examine Market Share In The	17
Relevant Product Markets	
1. Wholesale/Retail Competition	18
2. Loop/Transport Competition.	21
C. Duopolies Do Not Produce Competitive Prices.	21
V. UNE Forbearance Is Not Warranted For Either Verizon or Qwest	26
Conclusion.	27

SUMMARY

The Commission properly denied Verizon's and Qwest's Petitions for Forbearance from their statutory unbundling obligations, dominant carrier regulation of their access services and *Computer III* requirements in 10 of the largest Metropolitan Statistical Areas in the country. On remand, the Commission has the opportunity to articulate a workable and meaningful standard for determining whether there is sufficient competition in a market to relieve an incumbent LEC of its wholesale obligation to provide access to unbundled loops and transport at cost-based rates.

The Commission has asked whether it should depart from the market analysis approach used in the Omaha, Nebraska UNE forbearance proceedings. COMPTTEL submits that it should depart from that approach. Although Qwest sought forbearance from enforcement of a *wholesale* obligation in Omaha, the Commission granted forbearance based on the presence of a single facilities-based competitor in the *retail* market and the absence of any competition in the wholesale market. Once Qwest was freed from the obligation to provide access to UNE loops and transport in Omaha, it declined to negotiate rates for alternative products and referred requesting carriers to its special access products priced 30% to 151% higher than the equivalent UNEs. The supracompetitive rate increases forced one carrier to leave the market and another to abandon plans for entry. Contrary to the Commission's prediction, forbearance from enforcement of Qwest's wholesale obligations neither promoted competitive market conditions nor enhanced competition in Omaha. The Commission needs to candidly acknowledge that its predictive judgment in Omaha turned out to be not only overly

optimistic, but clearly erroneous. Both Section 10 of the Act and the public interest demand that the Commission apply a more exacting market share standard in order to gauge whether a market is so competitive that it is no longer necessary to enforce the network access obligations that Congress imposed on incumbent local exchange carriers.

The Commission's forbearance analysis must identify and evaluate the relevant product markets, evaluate the existence of actual facilities-based competition in the relevant product and geographic markets and calculate the incumbent's actual market share. Potential competition should not factor into the forbearance analysis at all. Where, as here, an ILEC petitions for relief from its Section 251(c)(3) wholesale obligations, the Commission must examine the extent of competition in both the wholesale and retail markets. If either or both are characterized by monopoly or duopoly, forbearance must be denied. In addition, where the evidence shows that competitors rely heavily on unbundled loops and transport purchased from the ILEC to serve their customers, the Commission should not grant forbearance in the absence of evidence that (1) the ILEC holds less than a 50% retail market share (determined separately for the residential and business markets) in the geographic area for which forbearance is sought and (2) there are at least two alternative wholesale providers in addition to the ILEC capable of serving 100% of the customer locations in the geographic market solely over their own facilities.

The evidence in these dockets showed that intramodal competitors in each of the 10 markets rely heavily on access to Verizon's and Qwest's last mile network facilities, including UNEs, and that there are no significant alternative sources of wholesale inputs in any of the 10 markets. The evidence also showed that the cable operator was the only

competitor that had deployed significant last mile network facilities in any of the markets and that the cable networks served primarily the residential, not the business, market.

The evidence also showed that Verizon and Qwest remain dominant in terms of market share in each of the MSAs. For all of these reasons, the Commission reached the right result in denying Verizon and Qwest forbearance from their statutory obligations to provide access to UNE loops and transport.

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COMMENTS OF COMPTTEL

COMPTTEL hereby submits its comments on the remands by the United States Court of Appeals of the *Verizon 6 MSA Forbearance Order*¹ and the *Qwest 4 MSA Forbearance Order*.² In those orders, the Commission properly denied Verizon’s and Qwest’s petitions for retail and wholesale deregulation in markets that are home to 48 million Americans and 18 million households. Nonetheless, the Court remanded the decisions with instructions for the

¹ *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (rel. Dec. 5, 2007), (“*Verizon 6 MSA Order*”)remanded sub nom. *Verizon Telephone Companies v. FCC*, 2009 U.S. App. Lexis 3269 (D.C. Cir. 2009).

² *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, FCC 08-174 (rel. Jul. 25, 2008), (“*Qwest 4 MSA Order*”)remanded sub nom. *Qwest Corporation v. FCC*, Case No. 08-1257 (D.C. Cir., Aug. 5, 2009).

Commission to explain why it had departed from its past practice and “applied a per se market share test that considered only actual, and not potential, competition in the marketplace”³ to determine whether the markets at issue were sufficiently competitive to warrant forbearance from enforcement of the statutory obligation to provide access to unbundled loops and transport at cost-based rates.

The Commission has asked for comment on whether it should depart from its recent precedent regarding marketplace analysis in forbearance petitions,⁴ including the *Omaha Forbearance Order*⁵ and the *ACS UNE Forbearance Order*.⁶ COMPTTEL submits that the Commission should depart from this precedent and should apply a more meaningful and effective standard in determining whether a market is competitive enough to relieve an ILEC of its statutory wholesale unbundling obligations. That standard must reflect a careful evaluation of the relevant product market(s), a careful and realistic evaluation of the existence of facilities-based competition in the relevant product and geographic markets and a careful calculation of the ILEC’s actual market share. Neither projected “potential” competition nor “predictive judgment” should play any role in the analysis. In markets such as those at issue here where

³ *Verizon Telephone Companies v. FCC*, 2009 U.S. App. Lexis 3269 at 27.

⁴ Public Notice, Wireline Competition Bureau Seeks Comment on Remands of *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance Order*, DA 09-1835 (rel. Aug. 20, 2009) at 3 (“Remand Public Notice”).

⁵ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”), *aff’d. sub nom., Qwest Corporation v. FCC*, 482 F. 3d 471 (D.C. Cir. 2007).

⁶ *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) (“*ACS UNE Forbearance Order*”), *appeals dismissed sub nom. Covad Communication Group, Inc. v. FCC*, Case Nos. 07-71076 *et al.* (9th Cir. 2007).

multiple competitors are dependent upon the ILECs for the last mile loop and transport needed to serve their customers, the Commission should not grant ILECs forbearance from their wholesale obligations in the absence of evidence that there are alternative suppliers to the ILEC in the wholesale market.

Specifically, when an ILEC seeks to be relieved of its statutory UNE wholesale obligations and there are competitors in the market that use the ILEC's UNEs to provide service to their own customers, the Commission should only grant forbearance where the ILEC demonstrates that (1) its retail market share is less than 50% and only lines served by a competitor solely over non-ILEC network and facilities are attributed to the competition *and* (2) there are at least two alternative facilities-based wholesale providers in addition to the ILEC whose networks reach and are capable of serving 100% of the customer locations in the geographic area for which forbearance is sought.

Pursuant to Section 10(a) of the Communications Act, the Commission may only forbear from enforcing an incumbent LEC's unbundling obligations under Section 251(c) if it determines that enforcement is not necessary to ensure that the ILEC's rates, charges, practices and regulations are just, reasonable and nondiscriminatory, to protect consumers and to promote competitive market conditions.⁷ In determining whether competition in a particular geographic market is sufficient to constrain the ILEC's rates and terms of service and protect consumers, the Commission must realistically weigh the extent to which forbearance from enforcement of the ILEC's obligation to provide access to UNEs is likely to deprive consumers of a choice of service providers, reduce the number of service providers currently available to consumers, increase the cost consumers will have to pay for service and otherwise adversely impact

⁷ 47 U.S.C. §160(a).

competitive market conditions. The Commission correctly determined that neither Verizon nor Qwest met its burden of showing that competition was sufficient in any of the 10 markets to avoid these negative impacts.

I. The Commission Should Acknowledge That It Made A Mistake In Omaha

Consistent with the Court’s instruction, the Commission must explain why it took a different path in assessing the level of competition sufficient to warrant forbearance in the *Verizon 6 MSA* and *Qwest 4 MSA Orders* than it took in the *Omaha Forbearance Order*. The Commission should just candidly concede that it made a mistake in Omaha. Experience has shown that the forbearance standard the Commission used to grant Qwest forbearance from its statutory obligations to provide access to unbundled loops and transport pursuant to Sections 251(c)(3) and 271(c)(2)(B)(ii) in Omaha, Nebraska worked neither to promote nor enhance competition as Section 10 of the Communications Act requires. Instead, application of that standard, which relied upon competition provided in the residential market by a single facilities-based cable provider, as well as “potential competition” that the Commission predicted would develop,⁸ resulted in at least one competitor leaving the Omaha market and another deciding not to enter. The Commission now has the opportunity to correct its error. As the Court noted:

Indeed, it may be reasonable in certain instances for the FCC to consider an ILEC’s possession of [redacted] percent, or any other particular percentage, of the marketplace, as a key factor in the agency’s determination that a marketplace is not sufficiently competitive to ensure its competitors’ abilities to compete. It may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition. Nevertheless, it is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.⁹

⁸ *Omaha Forbearance Order* at ¶69.

⁹ *Verizon Telephone Companies v. FCC*, at 26.

Both Section 10 of the Act and the public interest demand that the Commission apply a more exacting standard than was applied in the *Omaha Forbearance Order* before determining that a market is so competitive that it is no longer necessary to enforce the provisions enacted by Congress to promote the development of competition and afford consumers a choice of service providers, including Section 251(c)(3) and Section 271(c)(2)(B)(ii). Getting that standard right is critically important to the success of the Administration's broadband efforts.

A. The Aftermath of Forbearance in Omaha

Although the Commission found that the record in the Omaha Forbearance proceeding “does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market,”¹⁰ it nonetheless found that the public interest would be served by forbearing from enforcing Qwest's statutory duty to make UNE loops and transport available to competing carriers on a wholesale basis. It also found that forbearance “will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b).”¹¹ The Commission premised the forbearance relief granted to Qwest, at least in part, on its predictive judgment that “Qwest will not react to our decision here by curtailing wholesale access to its analog DS0-, DS1-, or DS3- capacity facilities,” that competitors would continue to have access to unbundled loops and transport pursuant to Section 271(c)(2)(B)(iv) and (v) and that market incentives would prompt Qwest to make its network available to competitors at competitive rates and terms.¹² Contrary to the Commission's predictions, at least two competitors – Integra Telecom and McLeodUSA -- have conclusively

¹⁰ *Omaha Forbearance Order* at ¶67.

¹¹ *Id.* at ¶75.

¹² *Id.* at ¶¶62, 79, 83.

demonstrated that Qwest did *not* make loops or transport available in Omaha on competitive rates or terms once it was granted forbearance and that forbearance did not promote competitive market conditions or enhance competition among providers of telecommunications services.¹³

Integra Telecom, Inc., a competitive local exchange carrier that has served customers in Qwest territories since 1998, conducted a market analysis of the Omaha market in mid-2005 and concluded that conditions were favorable for entry. Integra's conclusion was based upon the expectation that it would be able to obtain UNE loops and transport from Qwest. After the Commission relieved Qwest of the obligation to provide access to UNE loops and transport in nine wire centers, Integra reversed course and determined that it was not economically feasible to enter the Omaha market without access to UNEs throughout the market.¹⁴

In a Petition for Modification of the *Qwest Omaha Forbearance Order* filed more than two years ago, McLeodUSA detailed its post-forbearance experience with Qwest in Omaha. That experience shows that the Commission's predictive judgments were wide of the mark -- market incentives did not prompt Qwest to make unbundled loops and transport available to competitors on competitive rates and terms nor did the grant of forbearance enhance competition. The only high capacity loops and transport that Qwest has continued to make available to competitors in Omaha are special access services from its FCC Tariff No. 1. These tariffed special access services are not wholesale services, but are equally available to both end users and to carriers. In 2006, Qwest's average rate of return on its special access services was a whopping

¹³ See McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the Qwest Omaha Forbearance Order filed in WC Docket No. 04-223 on July 23, 2007 ("Petition for Modification"); Comments of Integra Telecom, Inc. and Affidavit of Dudley Slater filed in WC Docket No. 06-172 on March 5, 2007.

¹⁴ Affidavit of Dudley Slater, *supra*.

132%.¹⁵ The supracompetitive special access rates Qwest demanded for the essential inputs McLeodUSA needed to serve its customers caused McLeodUSA to exit the Omaha market.¹⁶

McLeod demonstrated that the Commission's predictive judgment that market incentives would prompt Qwest to make loops and transport available to other carriers at competitive rates and terms in the wake of its Omaha forbearance decision was not only overly optimistic, but also clearly erroneous. Qwest declined to negotiate rates, terms and conditions for the loops and transport it continues to be obligated to provide pursuant to Section 271 of the Act, 47 U.S.C. §271, and instead presented McLeod with take-it-or-leave-it template agreements and uneconomic special access pricing.¹⁷ The non-negotiable rates Qwest offered McLeod involved monthly recurring price increases over the UNE rates ranging from 30% for standalone DS0 loops¹⁸ to 138% for DS1 loops in one wire center to 151.5% for DS1 loops in five wire centers and to 165% for DS1 loops in the remaining three wire centers.¹⁹ The increase in non-recurring

¹⁵ See *In the Matter of Special Access Rates For Price Cap Local Exchange Carriers*, CC Docket No. 05-25, Comments of the AdHoc Telecommunications Users Committee at Appendix 1, page A-1 (filed Aug. 8, 2007).

¹⁶ See McLeodUSA Petition for Modification; *In the Matter of the Application of McLeodUSA Telecommunications Services, Inc., Hiawatha, Iowa, Seeking To Cease Providing Local Exchange Voice Services In Nebraska Wire Centers*, available at <http://www.psc.ne.US/home/NPSC/communication/order/Local%20Competition/C3922080528.pdf>; Comments Invited On Application of McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services To Discontinue Domestic Telecommunications Services, WC Docket No. 09-107, DA 09-1389 (rel. Jun. 22, 2009).

¹⁷ Eben Declaration filed with the McLeod Petition for Modification at ¶¶5 and 25 and Exhibits 1 and 3.

¹⁸ The 30% price increase over the UNE rates is Qwest's "commercial agreement" price for stand alone DS0 loops. McLeod Eben Declaration at Exhibit 1.

¹⁹ McLeod Eben Declaration at ¶¶7-8 and Exhibit 1 at 3.

charges for DS1 loops – 360% -- is even more phenomenal.²⁰ In order to avoid operating at a loss, competitors would have no choice but to pass the increased rates they must pay for essential inputs on to their customers or exit the market. When forbearance leads to such huge rate increases due to the absence of competition, it can hardly be said that enforcement of Sections 251(c)(3) and 271(c)(2)(B)(ii) is not necessary to constrain rates, protect consumers or promote competitive market conditions.

Despite the Commission's predictions of the competitive conditions that would prevail in the wholesale market post-forbearance, Qwest's ability to unilaterally increase rates for essential inputs to such levels is not reflective of a competitive marketplace and adversely impacts the viability of competitive carriers that rely on Qwest for last mile loop and other facilities. It also adversely impacts the consumers served by competitive carriers. Those consumers would at the very least either (1) see double or triple digit percentage increases in their telephone rates assuming their service provider determined that it was economically feasible to continue providing service in Omaha, or (2) would be forced to find a new service provider to the extent their service provider determined it was not economically feasible to remain in Omaha.

The only alternative to the month-to-month special access rates Qwest offered McLeod for DS1 and DS3 loops in the Omaha MSA was its Regional Commitment Plan ("RCP") rates, which are 22% lower than the month-to-month special access rates, but still 91% to 111% higher than the UNE rates for the nine wire centers where Qwest received forbearance.²¹ In order to qualify for those rates, however, a competitor would have to commit to a four-year term and to

²⁰ McLeod Petition for Modification at 9.

²¹ McLeod Eben Declaration at ¶13.

purchase a minimum of 90% of its total Qwest-provided DS1s and DS3s at the RCP rates.²² In other words, a carrier would have to forgo its right to purchase UNE DS1s and DS3s for all but 10% of its demand *throughout Qwest's entire 14-state* service territory in order to get a 22% discount off the monthly special access rates in the *nine Omaha wire centers* for which the Commission granted forbearance. In a blatant effort to deter carrier customers from purchasing services from competitive carriers whose presence in the market might serve to constrain Qwest's special access pricing, the RCP also contains a take-or-pay provision. For each month that an RCP customer falls below the 90% commitment level for its special access purchases, the customer must nonetheless pay Qwest the full amount that would have been billed had the 90% commitment been satisfied.²³ Thus, the RCP would make it uneconomical for a carrier to purchase all but a small fraction (10%) of its DS1 and DS3 demand throughout Qwest's 14-state service area from carriers other than Qwest even where such services are available.

Qwest imposed similarly onerous, non-negotiable conditions as the price for obtaining the "commercial agreement" rate for stand-alone DS0 loops. Although Qwest remains obligated to make stand-alone DS0 loops available to competitors pursuant to Section 271 of the Act in the nine wire centers where the Commission granted forbearance,²⁴ Qwest demanded that McLeod waive its rights under the Qwest Performance Assurance Plan and other wholesale quality service standards in order to secure a rate that is 30% over the UNE DS0 loop rate.²⁵ In granting Qwest Section 271 authorization in Nebraska, the Commission specifically found that the

²² McLeod Eben Declaration at ¶10.

²³ Qwest FCC Tariff No. 1, Section 7.1.3 at 7-104.

²⁴ *Omaha Forbearance Order* at ¶80.

²⁵ McLeod Eben Declaration at ¶24 and Exhibit 3, Appendix 4 at Section 4.6.

Performance Assurance Plan adopted by the Nebraska Commission provided assurance that the market would remain open after Qwest received Section 271 authority and constituted probative evidence that Qwest would continue to meet its obligation to provide nondiscriminatory service to competing carriers.²⁶ Qwest's attempt to nullify the mechanism put in place by the Nebraska Commission to monitor its compliance with its Section 271 nondiscrimination obligations as a condition of entering into a "commercial agreement" for stand-alone DS0 loops speaks volumes about its intent to comply with those obligations. As the only DS0 loop supplier in Omaha, Qwest is able to force customers to waive their legal rights to nondiscriminatory treatment as measured by the wholesale service quality standards to which Qwest is subject. Again, Qwest's post-forbearance behavior is not reflective of that of a carrier operating in a competitive marketplace.

In another transparent effort to deter competition from facilities-based carriers, Qwest priced stand-alone DS0 loops 30% higher than the QPP/QLSP UNE-P replacement product loop rate. Qwest cannot claim that its costs are lower for providing the finished QPP/QLSP product than for providing stand-alone loops. Its pricing strategy, however, rewards carriers that do not use any of their own facilities to serve end users and punishes facilities-based carriers that want to provide service through a combination of Qwest UNE loops and their own switching and other network facilities.

The only apparent alternative to the "commercial agreement" rate for stand-alone DS0 loops is the special access rate. The monthly recurring special access rate is 234% higher than

²⁶ *In the Matter of Application of Qwest Communications International For Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, Memorandum Opinion and Order, 17 FCC Rcd 26303 at ¶¶440, 443 (2002).

the UNE rate and the special access DS0 loop non-recurring charges are more than *11 times higher* than the UNE non-recurring charges.²⁷

As noted above, Qwest's average rate of return on its special access circuits in 2006 was 132%.²⁸ A triple digit rate of return cannot possibly be assumed to reflect competitive market conditions. Qwest's demonstrated unwillingness to negotiate the rates, terms and conditions of the loops and transport that it is required to provide to competitors in Omaha pursuant to Section 271 caused at least one carrier to leave the market²⁹ and a second carrier to abandon plans to enter the market.³⁰ This real life experience with the aftermath of premature wholesale deregulation shows that the Commission was clearly wrong in assuming that the presence of a single facilities-based cable competitor in the Omaha retail market was sufficient to constrain Qwest's rates, protect consumers and promote competition. In preparing its decision on remand, the Commission should acknowledge that it made a mistake in Omaha³¹ and that departure from that precedent was appropriate in the *Verizon 6 MSA* and *Qwest 4 MSA* Orders.

²⁷ McLeod Eben Declaration at Exhibit 1 at 1.

²⁸ See *In the Matter of Special Access Rates For Price Cap Local Exchange Carriers*, CC Docket No. 05-25, Comments of the AdHoc Telecommunications Users Committee filed August 8, 2007 at Appendix 1, page A-1.

²⁹ McLeodUSA Petition for Modification.

³⁰ Comments of Integra Telecom, Inc. and Affidavit of Dudley Slater filed in WC Docket No. 06-172 on March 5, 2007.

³¹ Anchorage presented a somewhat different situation. As a condition of granting forbearance to ACS in five wire centers in Anchorage, the Commission required ACS to continue to provide requesting carriers access to loop facilities under rates, terms and conditions reached through commercial negotiations. Until such a commercial agreement was reached, the Commission required ACS to provide its cable competitor access to loop facilities in the 5 wire centers under the rates, terms and conditions that the cable operator and ACS had previously negotiated and agreed on for Fairbanks, Alaska. *ACS UNE Forbearance Order*, at ¶22. No such condition was imposed on Qwest in Omaha.

II. Promotion Of Competition Is Critical To the Success of The National Broadband Plan

Clearly, the forbearance standard the Commission applied in Omaha was not appropriate for determining whether the market was competitive enough to warrant wholesale deregulation. To the extent the Commission needs additional incentive to depart from that precedent, it need look no farther than the Stimulus legislation enacted earlier this year. Congress and the Administration have allocated billions of dollars to expand access to and stimulate demand for broadband service.³² In addition, Congress has charged the Commission with developing a National Broadband Plan whose focus “is to enable the build out and utilization of high speed broadband infrastructure.”³³ Although broadband is available in most areas of the country,³⁴ subscribership rates remain less than optimal. Congress has directed the Commission to include in the National Broadband Plan “a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public.”³⁵

Cable operators and incumbent LECs continue to provide the vast majority of broadband connections.³⁶ One sure way to stimulate demand for and to increase the affordability of

³² American Recovery and Reinvestment Act, Pub.L.No. 111-5, Section 6001.

³³ *In the matter of A National Broadband Plan For Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. Apr. 8, 2009) at ¶ 1.

³⁴ FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *High Speed Services for Internet Access: Status As Of June 2008* (July 2009) at 4 (estimating that high speed DSL connections are available to 83% of the households to whom incumbent LECs could provide local telephone service and that high speed cable modem service is available to 96% of the households to which cable system operators could provide cable television service) (“*Broadband Report*”).

³⁵ American Recovery and Reinvestment Act, Pub.L.No. 111-5, Section 6001(k)(2)(B).

³⁶ *Broadband Report* at 3.

broadband is to promote competition in the provision of the service.³⁷ Only competition will bring rates down, increase the availability of offerings and drive maximum utilization of the network infrastructure. Prematurely relieving an ILEC of its statutory obligation to provide competitors access to the essential network elements they need to offer their customers broadband service will accomplish none of these goals, but will surely perpetuate the existing cable/ILEC duopoly.

Congress clearly contemplated that competition and competitive choice for consumers should be a central focus of the National Broadband Plan and the broadband grants and loans to be awarded by NTIA and RUS. All applicants for NTIA and RUS funds are required to adhere to the principles contained in the Commission's Internet Policy Statement,³⁸ including the principle that consumers are entitled to competition among network providers, application and service providers, and content providers.³⁹ Congress directed RUS to give priority in awarding loan funds to project applications "for broadband systems that will deliver end users a *choice* of more than one service provider."⁴⁰ In evaluating grant applications, NTIA reviewers are required to consider whether applicants for funds to construct last mile and middle mile infrastructure (i.e., loops and transport) will implement business plans that will allow more than one provider to serve end users in the funded areas and are directed to give additional

³⁷ See Comments of the Federal Trade Commission filed in GN Docket No. 09-51 at 1 ("Policies that promote competition and consumer protection can foster new and innovative offerings and greater consumer use of those services.")

³⁸ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (rel. Sep. 23, 2005).

³⁹ American Recovery and Reinvestment Act, Pub.L.No. 111-5, 123 Stat.115, 515; Notice of Funds Availability, 74 Fed. Reg. 33110 (July 9, 2009).

⁴⁰ American Recovery and Reinvestment Act, Pub.L.No. 111-5, 123 Stat. 115, 118 (emphasis added).

consideration to applicants that commit to offering wholesale access to their network facilities at reasonable rates and terms.⁴¹

Competitors use unbundled loops and transport to provide broadband service to end users and need access to those wholesale inputs to provide competitive service. The Commission must ensure that a faulty forbearance analysis does not frustrate the right of consumers to competition among network providers, application and service providers, and content providers that both the Commission and Congress have formally acknowledged and recognized.

III. Potential Competition Should Not Be A Factor In The Commission's Forbearance Analysis

The Commission has asked how the existence of potential competition should affect the Commission's forbearance analysis.⁴² The Commission's projections of "potential competition" should not factor into the forbearance analysis at all. As detailed above, the Commission's prognostication record with respect to market incentives and competitive behavior is not particularly strong. While it may be true that "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable and not unreasonably discriminatory,"⁴³ the same cannot be said for "potential competition" as the Omaha experience proved. Before taking the very significant step of declining to enforce statutory obligations imposed by Congress, the Commission should focus only on the state of actual competition in the relevant product markets.

The *Omaha Forbearance Order* is not the only example of the Commission's inappropriately relying on "potential" competition to justify deregulation. The Commission's

⁴¹ Notice of Funds Availability, 74 Fed. Reg. at 33120-33121.

⁴² Remand Public Notice at 3.

⁴³ *Omaha Forbearance Order* at ¶63.

predictive judgment of the impact of potential competition on ILEC pricing has also been called into question by the Government Accountability Office (“GAO”).⁴⁴ Beginning in 2001, the Commission began granting pricing flexibility for special access services to the price cap incumbent LECs based on the potential of collocated competitors to build their own networks to reach customers. The Commission predicted that in markets that met the collocation triggers, competition would be sufficient to discipline special access rates and drive interstate special access rates toward the marginal costs of providing those services.⁴⁵ The primary method by which the Commission sought to accomplish its deregulatory objective of driving rates toward costs was to progressively grant ILECs greater flexibility to set their own rates commensurate with the level of competition that had developed.⁴⁶ As was the case in Omaha, the Commission’s predictive judgment has failed to materialize. The GAO found in a study completed in 2006 that the ILECs’ special access prices and average revenues are higher on average in Phase II MSAs where competition is theoretically most vigorous than they are in Phase I MSAs or areas where prices are still constrained by price caps. The GAO also found that list prices for special access services have increased on average since Phase II pricing flexibility was granted.⁴⁷ Significantly, the GAO also determined that Phase II MSAs generally have a

⁴⁴ Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) at 27-28 (“GAO Report”).

⁴⁵ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) at ¶61 (“*TRRO*”), *aff’d sub nom. Covad Communications Company v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994 at ¶18 (2005) (“*Special Access Order*”).

⁴⁶ *TRRO* at ¶61.

⁴⁷ GAO Report at 13, 27-28. The GAO Report is consistent with evidence that McLeod has submitted to the Commission showing that once Qwest was granted Phase II pricing flexibility

lower percentage of buildings lit by competitors than Phase I MSAs, again indicating that the Commission's competitive triggers do not accurately predict competition for last mile access to buildings.⁴⁸ Contrary to the Commission's prediction that pricing flexibility would drive special access rates towards the costs of providing the service, ILECs have been able to implement rate *increases* for special access services after being deregulated on the assumption that competition would constrain rates.

These experiences underscore the ineffectiveness of the Commission's presumption that "potential" competition will either constrain rates for Section 271 elements once the Commission declines to enforce Section 251(c)(3) or will constrain rates for special access services once the Commission grants the ILECs Phase II pricing flexibility.

IV. Actual ILEC Market Share and Actual Facilities-Based Competition Should Be The Touchstones Of The Commission's UNE Forbearance Analysis

The Commission has asked what evidence beyond market share for a particular product market is relevant to whether forbearance from unbundling is warranted.⁴⁹ Where the ILEC retains market power, as Qwest and Verizon do in the 10 MSAs at issue, the Commission cannot determine that enforcement of Section 251(c)(3) is not necessary (1) to ensure that the ILECs' charges and practices are just, reasonable and not unjustly discriminatory, (2) to protect consumers by ensuring that they have access to reasonably priced service from the carrier of their choice and (3) to promote and enhance competition. At a minimum, the Commission

in the Omaha MSA, it *increased* its special access monthly DS1 channel termination rates 45.83% over the price cap rate for month-to-month customers, 42.61% over the price cap rate for one year term customers and 31.58% over the price cap rate for two-year term customers. McLeod USA Petition for Modification, Eben Declaration at ¶9.

⁴⁸ GAO Report at 12-13.

⁴⁹ Remand Public Notice at 3.

should not grant an ILEC forbearance from the statutory obligations to provide access to unbundled loops and transport unless the ILEC has a retail market share of less than 50% *and* faces significant competition from more than one wholesale provider able to provision transport and last mile access over its own facilities to 100% of the customer locations in the geographic market for which forbearance is requested.⁵⁰ Any assessment of competition must look at both the retail market and the wholesale market. If one or both are characterized by monopoly or duopoly, forbearance should be denied.

A. The ILEC Market Share Calculation Must Include All Lines Provisioned Over The ILEC's Network and Facilities

While the Commission correctly found in both the Verizon and Qwest decisions that competition that relies on the ILEC's own facilities is not a sufficient basis to grant forbearance from UNE requirements,⁵¹ it incongruously attributed resold ILEC lines and lines provisioned with the ILECs' UNE-P replacement products to competitors for purposes of calculating the ILECs' market share.⁵² These services are provided solely over the Verizon and Qwest networks, Verizon and Qwest set the rates for the services, and the services do not "compete" with their retail services. For these reasons, resold lines and lines provisioned with the ILECs' UNE-P replacement product cannot constrain the rates, terms or conditions the ILECs set for

⁵⁰ The Commission has applied a similar standard in determining whether an ILEC should be freed from dominant carrier regulation in the provision of access services. See *Verizon 6 MSA Order* at ¶30; *Qwest 4 MSA Order* at ¶28.

⁵¹ *Verizon 6 MSA Order* at ¶42; *Qwest MSA Order* at ¶41; but see *Qwest Omaha Forbearance Order* at ¶68 ("competition" that relied on Qwest's wholesale inputs used to justify relief from Section 251(c)(3) unbundling obligations).

⁵² *Verizon 6 MSA Order* at ¶¶27, 37, n. 89 and Appendix B; *Qwest 4 MSA Order* at ¶¶27, 36, n. 105 and Appendix B.

their retail services and are not appropriately characterized as “CLEC lines.” As a result, they should be attributed to Verizon and Qwest for purposes of calculating market share.

B. The Commission Must Examine Market Share In The Relevant Product Markets

Although it has never explained precisely why, the Commission in the past has declined “to formally define product markets pursuant to a market power analysis for purposes of our UNE forbearance analysis.”⁵³ This has led to absurd results. In Omaha, for example, the Commission granted Qwest forbearance from Section 251(c)(3) based on the presence of one facilities-based cable provider operating primarily in the retail mass market.⁵⁴ Thus, Qwest was relieved of the obligation to provide unbundled access to DS1 and DS3 transport and last mile loops -- products not purchased by or used to serve the retail mass market -- because the Commission determined that there was sufficient competition in the retail mass market. The Commission cannot perform a meaningful analysis of market share for purposes of determining the competitiveness of a market without first defining the relevant product markets.

1. Wholesale/Retail Competition

Where an ILEC requests forbearance from the Section 251 obligation to provide UNE loops and ports, as Verizon and Qwest have done here, and where the record demonstrates that competitors in the retail market rely heavily on access to UNE loops and transport to serve their customers, as is the case for the 10 MSAs at issue,⁵⁵ the Commission’s forbearance analysis must focus on the level of facilities-based competition in the wholesale market. UNE loops and transport are wholesale products, not retail products. While competition in the wholesale market

⁵³ *Qwest 4 MSA Order* at n. 129.

⁵⁴ *Omaha Forbearance Order* at ¶ 2.

⁵⁵ *Verizon 6 MSA Order* at ¶¶ 23, 37, 38, 42; *Qwest 4 MSA Order* at ¶¶ 16, 36.

is likely to positively impact competition in the downstream retail market, the opposite is not true. For this reason, it makes no sense to assume, as the Commission did in Omaha, that competition in the retail market will constrain an ILEC's rates, terms or conditions for wholesale services, protect consumers of wholesale services or promote competition among telecommunications providers. Because the only alternatives to UNE loops and transport available from the ILECs are supracompetitively-priced special access channel terminations and transport, prematurely eliminating the ILECs' obligations to provide access to UNE loops and transport in the absence of alternatives available from facilities-based wholesale providers will squelch rather than promote competitive market conditions and will diminish rather than enhance competition among telecommunications providers.

In the *TRRO*, the Commission specifically declined to adopt a rule foreclosing access to Section 251 UNEs solely because of the availability of the ILECs' special access services⁵⁶ The Commission found that the availability of UNEs serves as a check on special access pricing and that in the absence of UNEs, carriers using special access could lose substantial bargaining power when negotiating special access rates.⁵⁷ In addition, the Commission determined that where UNEs are unavailable, ILECs would have the incentive to price their tariffed special access services at levels that will foreclose facilities-based competition:

In the absence of UNEs, incumbent LECs would, in some metropolitan statistical areas (MSAs), have the ability to set the price of their direct competitors' critical wholesale inputs (e.g., tariffed end-user channel termination and dedicated transport offerings). . . . An incumbent in that situation would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a "price squeeze" and foreclosing competition based on use of the tariffed wholesale input.

⁵⁶ *TRRO* at ¶ 52.

⁵⁷ *TRRO* at ¶ 65.

* * *

[A] rule that foreclosed access to all UNEs wherever competitors had access to tariffed alternatives would diminish the facilities-based competition that is the most effective discipline to anticompetitive price squeezes. Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream market. Moreover, we believe that the uncertainty and risk associated with even the possibility of such abuse would chill competitive entry, because competitive carriers might well be averse to initiating service when they know that the incumbent could – on one day's notice, without Commission approval, and with limited market-based discipline – render competition untenable by raising tariffed prices.⁵⁸

The Commission's *TRRO* analysis accurately predicted what has happened in Omaha since the Commission relieved Qwest of the obligation to provide UNE loops and transport. It is also an accurate precursor of what would happen in the 6 Verizon MSAs and the 4 Qwest MSAs if the Commission granted forbearance because Verizon's and Qwest's special access services are the only ubiquitously available alternatives to UNEs.⁵⁹ Verizon's and Qwest's ability to manipulate the price of their competitors' wholesale inputs in the absence of UNEs would both foreclose competition and chill competitive entry in the downstream retail market.

Where competition in the retail market depends on the availability of Section 251(c)(3) wholesale inputs from the ILEC, the Commission should not forbear from enforcing Section 251(c)(3) unless there are at least two wholesale providers in addition to the ILEC that offer transport and last mile access over their own facilities capable of serving 100% of the end users in the geographic market for which forbearance is sought. Such a standard will diminish the risk that premature deregulation in the wholesale market will significantly depress competition in the

⁵⁸ *TRRO* at ¶¶59, 63. The Commission also found that the presence of facilities-based competitors relying upon UNEs may play a critical role in constraining special access pricing. *Id.* at ¶62.

⁵⁹ *Verizon 6 MSA Order* at ¶ 38 (record does not reflect any significant alternative source of wholesale inputs for carriers in any of the 6 MSAs); *Qwest 4 MSA Order* at ¶ 37 (record does not reflect any significant alternative source of wholesale inputs for carriers in any of the 4 MSAs).

retail market. The Commission appropriately found that the records developed in the Verizon 6 MSA and the Qwest 4 MSA forbearance proceedings showed no significant alternative sources for wholesale loop or transport inputs. The Commission was justified in denying Verizon's and Qwest's request for forbearance from Section 251(c)(3) on this basis alone.

2. Loop/Transport Competition

Where an ILEC requests forbearance from the obligation to provide both unbundled loops and unbundled transport, as Verizon and Qwest have done, the Commission must separately evaluate competition in the wholesale market for loops and the wholesale market for transport. The Commission has previously determined that last mile access and local transport constitute separate relevant product markets that may be subject to varying levels of competition.⁶⁰ There is no reason to depart from that precedent in the forbearance analysis. In determining whether an ILEC is entitled to relief from the obligation to provide access to unbundled loops, the Commission must also separately evaluate competition for last mile loop facilities deployed to mass market and those deployed to business customers.

C. Duopolies Do Not Produce Competitive Prices

In granting forbearance from Section 251(c) in both Omaha and Anchorage, the Commission relied on the presence of a single facilities-based competitor – the cable operator -- capable of serving 75% of end users using its own network. Section 10(a)(1) provides that the Commission may not forbear from applying a regulation or provision of the Communications Act unless it finds that enforcement of the regulation or statutory provision is not necessary to ensure that the carrier's charges, practices, classifications or regulations are just, reasonable and

⁶⁰ See, *In the Matter of Verizon Communications, Inc. and MCI, Inc. For Approval Of Transfer Of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184 (rel. Nov. 17, 2005); see also, *TRRO* at ¶¶66 and 146 (establishing different rules to evaluate impairment on transport routes than to evaluate impairment for last mile access).

not unjustly or unreasonably discriminatory. There is an extensive body of literature that demonstrates that duopoly market conditions produce high prices, frustrate innovation and can lead to tacit collusion by providers. Two facilities-based retail alternatives to the ILEC are the minimum necessary to discipline the ILEC's retail rates, terms and conditions of service and two facilities-based wholesale alternatives to the ILEC are the minimum necessary to discipline the ILEC's wholesale rates, terms and conditions of service.

The wireless markets have been studied to determine the effect of duopoly structure on pricing and possible collusion.⁶¹ Parker and Roller evaluated wireless pricing during 1984 and 1988 when the Commission licensed only two competing cellular services in each geographic area,⁶² thereby creating a duopoly.⁶³ Their analysis concluded that the carriers' behavior was consistent with tacit collusion to sustain higher prices.⁶⁴ Consumer harm from duopoly conditions in wireless markets is not limited to the United States. Stoetzer and Tewes concluded that tacit collusion characterized the German market during similar conditions,⁶⁵ while Valletti

⁶¹ A useful survey addressing pricing in the wireless markets can be found in: Gans, J.S., King, S.P. and Wright, J., *Wireless Communications, Handbook of Telecommunications Economics V2*, M. Cave, S. Majumdar and I. Vogelsang, eds., North-Holland, 2005 at 260-264.

⁶² *See, In the Matter of the Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect To Commercial Mobile Services*, 10 FCC Rcd 8844 (1995) at ¶3.

⁶³ *See Collusive Conduct in Duopolies: Multimarket Contact and Cross-ownership in the Mobile Telephone Industry*, P. Parker, and L.H. Roller, *RAND Journal of Economics*, 28(2) 1997 at 304-322.

⁶⁴ *See also Multimarket Contact and Price Coordination in the Cellular Telephone Industry*, M. Busse, *Journal of Economics and Management Strategy*, 9(3) 2000, at 287-320.

⁶⁵ *Competition in the German Cellular Market*, M. Stietzer and D. Tewes, *Telecommunications Policy*, 1996, 20, 303-310.

and Cave argue that tacit collusion explained seven years of stable prices in the United Kingdom followed by a sudden decrease in prices following the entry of two new competitors in 1993.⁶⁶

Several years ago, the GAO did a study of the video distribution market, which at the time was highly concentrated, with consumer choice limited to an incumbent cable provider and a broadcast satellite provider. The GAO estimated that the addition of a single *additional* competitor (*i.e.*, a broadband service provider) produced lower rates and better service.⁶⁷ Based on the GAO's analysis, moving away from a duopoly-like structure (cable plus satellite) produced rates 15% to 41% lower in five of the six markets studied.⁶⁸

Finally, there is a growing body of evidence that duopoly conditions in residential telephone markets are producing higher rates for consumers when the incumbent's prices are deregulated. In 2006, the California Public Utility Commission began eliminating price caps on local services provided by ILECs, relying on competition from cable (as well as wireless and VoIP) to constrain the ILECs' pricing behavior. A recent analysis concluded that most California consumers have a choice of only two wireline providers – the ILEC and the cable provider.⁶⁹ Since 2006, AT&T and Verizon have increased basic local service rates by between 13% and 26%, increases that are estimated to cost California consumers more than \$100 million

⁶⁶ *Competition in UK Mobile Communications*, T. Valletti and M. Cave, Telecommunications Policy, 1998, 22, 109-131.

⁶⁷ U.S. General Accounting Office, *Wire-based Competition Benefited Consumers in Selected Markets*, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO 04-241 (February 2004). Consistent with overall trends towards integrated services, the competitive providers studied offered video, Internet access and telecommunications (as do the incumbent cable providers).

⁶⁸ *Id.*, at 1.

⁶⁹ *Why "Competition" is Failing to Protect Consumers*, T. Roycroft, TURN, March 25, 2009, at iii.

annually.⁷⁰ During that same period, Verizon has increased Lifeline rates by 12%, directory assistance rates by 188%, the price of a three minute toll call by 171%, and returned check charges by 233%.⁷¹ Such rate increases are not reflective of a competitive market place. Rather than driving rates toward marginal cost, deregulation has had the opposite effect.

The California experience – *i.e.*, deregulation producing higher retail rates – has been repeated in other states. In 2006, the Illinois Commerce Commission deregulated most residential rates in the Chicago MSA, where AT&T and Comcast dominate the market, while the rest of the state remained under price cap regulation. Following deregulation, AT&T implemented significant rate increases for residential local telephone services in the Chicago MSA. Indeed, the rates were raised to levels higher than the rates in the areas of the state where the services are deemed to be “non-competitive.” Thus, rather than reducing rates to respond to competitive pressures in the market, AT&T has been able to take advantage of the absence of price constraining regulation to increase rates in the allegedly “competitive” Chicago market, generating net revenue increases of \$149 million per year.⁷² As the Illinois Attorney General concluded, “[t]he absence of serious price competition between AT&T Illinois and Comcast at the retail level and their combined . . . retail market share is by itself a compelling demonstration of the existence of a duopoly exhibiting implicit, if not explicit coordinated conduct.”⁷³

⁷⁰ *Id.*, at i.

⁷¹ *Id.*

⁷² *See Report on the Competitiveness of the Residential Telecommunications Market and Price Changes in Illinois MSA 1 Since Entry of 2006 Final Order Submitted By The People Of The State Of Illinois*, filed in Illinois Commerce Commission Docket 06-0027 by the Illinois Attorney General’s Office on December 2, 2008.

⁷³ *Id.* at 16.

In 2005, the Texas Legislature deregulated all of AT&T's local retail rates in markets that had a population exceeding 30,000 and at least two competitors (including wireless). The only residential service that remained subject to price caps was a "stand-alone" local exchange voice service. Once deregulated, AT&T introduced a "new" version of its residential local exchange service, which it called "Standard Plus," that automatically applied to any residential line that included *any* additional feature or service.⁷⁴ Since May 2006, AT&T has used Standard Plus to increase local rates (at least for any customer that subscribes to more than simply stand-alone basic local service) by between 58% (in its largest exchanges) and 90% (in its smallest markets).⁷⁵

What these examples suggest is that retail markets with only two facilities-based providers are not competitive and that consumers in such markets are likely to experience an increase, rather than a decrease, in their rates once deregulation is implemented. Premature forbearance from Section 251 virtually guarantees that there will be only two facilities-based competitors left standing – the ILEC and the cable operator. There is no reason to believe that Verizon and Qwest would not raise the rates for loops and ports significantly in the 10 MSAs, as

⁷⁴ Notably, customers did not affirmatively select Standard Plus service, as much as they were converted to the "new" local service by virtue of their decision under the prior rate schedule to add a feature or service to their account. Among the decisions that would convert a consumer to "Standard Plus" service was the decision to add an additional directory listing.

⁷⁵ See Direct Testimony of Joseph Gillan, *Petition For Review Of Monthly Per Line Support Amounts From The Texas High Cost Universal Service Plan Pursuant To PURA § 56.031 And P.U.C Subst. R. 26.403*, Texas Public Utilities Commission, PUC Docket No. 34723/SOAH Docket No. 473-08-0288, January 11, 2008, at 42-48. In Illinois, AT&T adopted similar rate increases for *uSelect 3* (local services with 3 custom calling features) after deregulation. In addition to imposing rate increases on existing *uSelect 3* customers, it grandfathered the offering to existing customers only, replacing it for new customers with the *Select Feature Package* priced 12% higher. *Report on the Competitiveness of the Residential Telecommunications Market and Price Changes in Illinois MSA 1 Since Entry of 2006 Final Order Submitted By The People Of The State Of Illinois* at 8.

Qwest did in Omaha, once the wholesale market is deregulated, thereby chilling entry and driving competitors from the market. Clearly, granting forbearance from UNE obligations based on retail competition from a single cable competitor is not consistent with the mandate of Section 10. The Commission should not again characterize a duopoly retail market as sufficiently competitive to warrant forbearance from enforcement of an ILEC's Section 251(c)(3) wholesale unbundling obligations.

V. UNE Forbearance Is Not Warranted For Either Qwest Or Verizon

The Commission correctly denied both Verizon's and Qwest's forbearance petitions. The records showed that the intramodal competitors in each of the 10 markets rely significantly on access to the Verizon's and Qwest's wholesale last mile network facilities, including UNEs.⁷⁶ The records also showed that there are no significant alternative sources of wholesale inputs for carriers in any of the 10 markets.⁷⁷ On the retail side, the evidence showed that a cable operator was the only competitor that had deployed significant last mile network facilities in any of the markets, and that the cable operator's network served primarily residentia, not business, customers.⁷⁸ In all of the markets, Verizon and Qwest remained dominant in terms of market share. For all of these reasons, the Commission properly determined that competition was not sufficient in any of the 10 markets to relieve Verizon or Qwest of the statutory wholesale obligations Congress imposed in Section 251(c)(3).

In order to fulfill the Administration's goals of promoting the availability of a choice of providers and services in the broadband market and increasing the affordability of broadband

⁷⁶ *Verizon 6 MSA Forbearance Order* at ¶23; *Qwest 4 MSA Forbearance Order* at ¶16.

⁷⁷ *Verizon 6 MSA Forbearance Order* at ¶38; *Qwest 4 MSA Forbearance Order* at ¶37.

⁷⁸ *Verizon 6 MSA Forbearance Order* at ¶¶30, 37; *Qwest 4 MSA Forbearance Order* at ¶¶28, 36.

service, the Commission cannot eliminate an ILEC's obligation to provide wholesale access to unbundled loops and transport in markets where competitors rely on such elements to serve their customers and there are no ubiquitously available wholesale alternatives. As the Supreme Court has acknowledged, competition will produce not only lower prices, but also better goods and services. The free opportunity to select among alternative offers will favorably affect quality, service and cost. *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990). Regulation that has the effect of eliminating or diminishing competition will produce higher prices and stifle innovation.

Conclusion

For the foregoing reasons, the Commission should acknowledge that it made a mistake in granting Qwest forbearance from the obligation to provide unbundled loops and transport at cost based rates in Omaha based on the presence of a single facilities-based provider in the retail mass market. On remand, the Commission must articulate a forbearance standard, such as that proposed by COMPTTEL, that will not drive competitors from the market.

Respectfully submitted,

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